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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934.

No. 658

No. 24756. Supreme Court of Ohio.

MAX SENIOR,

Appellant,

vs.

GEORGE C. BRADEN ET AL.,

Appellees.

STATEMENT AS TO JURISDICTION.

(a) The statutory provision believed to sustain the jurisdiction of the United States Supreme Court in this case is Section 237 (a) of the Judicial Code, contained in the Act of February 13, 1925, Chapter 229, 43 Stat. 936, page 39:

> "An Act to amend the Judicial Code, and to further define the jurisdiction of the circuit courts of appeals and of the Supreme Court, and for other purposes."

(b) The statute of the State of Ohio, the validity of which is involved, is Section 5323 of the General Code of Ohio (114 Ohio Laws, 715-16), which reads as follows:

> "The term 'investments' as used in this title, includes the following:
>
> "Shares of stock in corporations, associations and joint stock companies, under whatever laws organized

or existing, excepting (1) those in such corporations and associations as constitute instrumentalities of the Federal government for the taxation of which by the several States no provision is made by act of the Congress of the United States, (2) those in financial institutions, dealers in intangibles and domestic insurance companies as defined by chapter four of this title, and (3) such as are defined in this chapter as 'deposits.'

"Interest bearing obligations for the payment of money, such as bonds, certificates of indebtedness, debentures and notes; certificates of deposit, savings and other like deposits in financial institutions outside of this State yielding income by way of interest or dividends in excess of four per centum of the principal sum withdrawable; and other similar evidences of indebtedness, whether negotiable or not, and whether or not secured by mortgage of or lien upon real or personal property or income, by whomsoever issued, excepting such as have been issued (1) by the United States or any of its territories, districts, or dependencies, or (2) by any instrumentality of the Federal government, or (3) prior to the first day of January, 1913, by the State of Ohio or any political or other subdivision or school district in this State and (4) bonds of the State of Ohio issued pursuant to Article VIII, Section 2a of the Constitution of Ohio and (5) such as are defined in this chapter as 'deposits' and 'current accounts.'

"Annuities, royalties and other contractual obligations for the periodical payment of money and all contractual and other incorporeal rights of a pecuniary nature whatsoever from which income is or may be derived, however evidenced, excepting (1) patents and copyrights and royalties derived from each, (2) interests in land and rents and royalties derived therefrom, other than equitable interests divided into shares evidenced by transferable certificates and (3) employment and partnership contracts and salaries and wages derived therefrom.

"All equitable interests, life or other limited estates and annuity interests in any investment hereinbefore described, or in any fund made up of any such investments, wherever located."

There are also involved Sections 5388 (114 Ohio Laws, 720-1), 5389 (114 Ohio Laws, 721), 5638 (114 Ohio Laws, 722) and 5322 (General Code of Ohio, 1910, Volume 2, page 1145).

"SEC. 5388. . . . Excepting as herein otherwise provided, personal property shall be listed and assessed at seventy per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at the times as of which it is required to be estimated on the average basis, as the case may be. Deposits not taxed at the source shall be listed and assessed at the amount thereof in dollars on the day as of which they are required to be listed. Money shall be listed and assessed at the amount thereof in dollars on hand on the day as of which they are required to be listed. In listing investments, the amount of the income yield of each for the calendar year next preceding the date of listing shall, excepting as otherwise provided in this chapter, be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield; but any property defined as investments in either of the first two subparagraphs of Section 5323 of the General Code which has yielded no income during such calendar year shall be listed and assessed as unproductive investments, at the true value thereof, in money, on the day as of which such investments are required to be listed.

"Credits and other taxable intangibles shall be listed and assessed at the true value thereof, in money, on the day as of which the same are required to be listed.

"Personal property of the following kinds, used in business, shall be listed and assessed at fifty per centum of the true value thereof, in money, on the day as of which it is required to be listed, or on the days or at

the times as of which it is required to be estimated on the average basis, as the case may be. * * *"

"SEC. 5389. * * * As used in Section 5388 of the General Code and elsewhere in this chapter, the 'true value in money' of any property means the usual selling price thereof at the time or times and places as of which it is required to be listed; but if there is no usual selling price known to the person whose duty it is to fix a value thereon, then, such price as is believed could be obtained therefor in money, at such time or times and place. In the case of personal property used in business, the book value thereof, if any, less book depreciation, at such time or times, shall be listed and such depreciated book value shall be taken to be the true value of such property, unless the assessor shall find that such depreciated book value is greater or less than the then true value of such property in money. Claim for any deduction from depreciated book value must be made in writing by the taxpayer at the time of making return; and when such return is made to the county auditor and required by this chapter to be transmitted to the commission for assessment, the county auditor shall, as deputy of the commission, investigate such claim and shall enter thereon, or attach thereto, in such form as the commission may prescribe, his findings and recommendations with respect thereto; when such return is made to the commission such claim for deduction shall be referred to the auditor of each county wherein the property affected thereby is listed, as such deputy, for investigation and report.

"'Income yield' as used in Section 5388 of the General Code and elsewhere in this title means the aggregate amount paid as income by the obligor, trustee or other source of payment to the owner or owners, or holder or holders of an investment, whether including the taxpayer or not, during such year, and includes the following:

"In the case of an obligation bearing interest, the amount of interest separately charged and paid dur-

ing such year, if any, exclusive of payments on the principal; in the case of shares of stock, the cash dividends so paid; in the case of annuities or other obligations for periodical installment payments including both principal and interest, not separately charged and paid, four per centum of half of the principal used to purchase the same, or, if there be no such principal, four per centum of half of the present worth of such payments if commuted, which shall be calculated, as of the date on which such investment is required by this chapter to be first listed, with interest at four per centum per annum and, in the case of annuities for life or lives, according to the Combined Annuity Four Per Cent Table; in the case of equitable interests, the cash distributions of income so made. At the request of the commission or of any county auditor, the superintendent of insurance shall, upon being furnished with a statement of the facts, compute upon a basis equivalent to that herein prescribed, the income yield of any investment as to which the interest is not charged and paid separately from the principal thereof, and the assessor shall be governed by the computation so made."

"SEC. 5638. For the purpose of the general revenues of the municipal corporations, school districts and special taxing districts in this State, and to lessen the burden of general taxation on real property, taxes are hereby levied on the kinds and classes of intangible property, hereinafter enumerated, on the grand classified tax list and duplicate of the State of Ohio at the following rates, to-wit: investments, five per centum of income yield; unproductive investments, two mills on the dollar; deposits, two mills on the dollar; shares in and capital employed by financial institutions, two mills on the dollar; shares in and capital employed by dealers in intangibles, five mills on the dollar; capital and surplus of domestic insurance companies, five mills on the dollar; and moneys, credits and all other taxable intangibles so listed, three mills on the dollar."

"SECTION 5322. The terms 'real property' and 'land' as so used, include not only land itself, whether laid out in town lots or otherwise, with all things contained therein but also, unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind thereon, and all rights and privileges belonging, or appertaining thereto."

(c) The date of the judgment sought to be reviewed is November 21, 1934, and the date upon which the application for appeal was presented is December 13th, 1934.

The nature of the case will perhaps best be made apparent from the syllabus of the opinion of the Ohio Supreme Court, filed November 21, 1934, as follows:

"1. Land trust certificates in the following trusts, Lincoln Inn Court Ground Rent, Cincinnati, Ohio; Clark Randolph Building Site, Chicago, Illinois; Woman's City Club, Cincinnati, Ohio; Rockefeller Building, Cleveland, Ohio; Insurance Exchange Building, Boston, Massachusetts; City National Bank Building, Omaha, Nebraska and Fidelity Mortgage Co. Building, Cleveland, Ohio, are mere evidences of an existing right to participate in the net rentals of the real estate being administered by the respective trusts.

"2. Ascribing to such certificates all possible virtue, the holder thereof is at best the owner of equitable interests in real estate divided into shares evidenced by transferable certificates. Section 5323, General Code, does not provide for a tax against the equitable interests in land but does provide a tax against the income derived from such equitable interests.

"3. Such certificates represent an intangible right within the purview of Section 5323, General Code, and are taxable as such, nothwithstanding the fact that the particular real estate out of which such right issues is likewise taxed.

"4. Such rights are taxable in the State where the owner is domiciled, regardless of the location of the real estate against which such certificates are issued.

"5. Section 5323, General Code, violates no Federal or State constitutional right of the holder of such certificates."

In the Ohio Supreme Court, the syllabus is written by the court and is the law of the case.

The suit was brought by appellant as plaintiff in the Common Pleas Court of Hamilton County, Ohio, against the Tax Commission of Ohio and the Auditor and Treasurer of Hamilton County, Ohio, to enjoin the defendants from placing on the tax duplicate and collecting taxes on plaintiff's certificates of equitable interest in real estate evidenced by conveyable certificates. The petition reads, in part:

"Plaintiff says that the assessing and collecting of taxes on plaintiff's said equitable interests in land evidenced by transferable certificates, when all other equitable interests in land not so evidenced are exempted therefrom, is an arbitrary and unreasonable discrimination without warrant of law, and amounts to a taking of private property without due process of law, and denies to plaintiff, a citizen of the United States, the equal protection of the law, in violation of plaintiff's rights under the Constitution of the United States and of Article XIV, Section 1, of the amendments thereto.

"Plaintiff further says that the lands in which plaintiff has such equitable ownership, as aforesaid, have been assessed in the names of the legal owners or lessees thereof according to value, without any deduction or diminution by reason of plaintiff's interests in said lands. Plaintiff says that the levying and collecting of taxes on his equitable interests in the lands so assessed at full value in the names of the owners of lessees constitutes double and unequal taxation in vio-

lation of the Constitution of Ohio and Article XII, Sections 2 and 5 thereof. Plaintiff further says that equitable interests in land whether evidenced by transferable certificates or not, constitute interests in real estate within the purview of Section 5322 of the General Code of Ohio, defining real property and land; and that Section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in land other than by uniform rule is contrary to Article XII, Section 2, of the Constitution of Ohio, which provides that 'land and improvements thereon shall be taxed by uniform rule according to value'.

"Plaintiff further says that the levying and collecting of taxes on plaintiff's equitable interests in real estate situated outside the State of Ohio, to-wit, the Clark Randolph Building Site in Chicago, Illinois, the Insurance Exchange Building in Boston, Massachusetts, and the City National Bank Building in Omaha, Nebraska, is an attempt to levy and collect taxes on property wholly outside the State of Ohio, is beyond the taxing power of the State of Ohio and amounts to a taking of private property without due process of law in violation of the Constitution of the State of Ohio and Article I, Section 16 thereof, and of the Constitution of the United States and Article XIV, Section 1, of the Amendments thereof."

The Common Pleas Court rendered an opinion reported in 30 O. N. P. (n. s.) 147, and entered a final decree to the effect that

"Section 5323 of the General Code of Ohio, insofar as it purports to tax equitable interests in land, and rents derived therefrom, when such equitable interests are evidenced by transferable certificates, is illegal, unconstitutional and void, violating the Constitutions of the State of Ohio and of the United States of America and amendments thereof; and that the relief prayed for in plaintiff's petition should be granted."

This judgment was reversed by the Court of Appeals for the First District of Ohio, which found in its judgment entry:

> "That the Court of Common Pleas erred in holding that Section 5323 of the General Code of Ohio insofar as it purports to tax equitable interests in lands and rents derived therefrom when such interests are evidenced by transferable certificates, is illegal, unconstitutional and void, violating the Constitutions of the State of Ohio and of the United States of America and amendments thereto.
>
> "It is therefore considered and ordered by the Court that the judgment heretofore rendered in this cause by said Court of Common Pleas be, and the same hereby is, reversed and that the petition of this defendant in error in the court below be, and the same hereby is, dismissed at the costs of the defendant in error."

This appellant then prosecuted error to the Supreme Court of Ohio as a matter of right under Section 2 of Article IV of the Constitution of Ohio which provides that the Supreme Court shall have:

> "appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this State, * * *."

The petition in error summarized the petition filed in the trial court and the contention that the statutes above referred to denied to plaintiff, a citizen of the United States and of the State of Ohio, the equal protection of the laws and deprived him of his property without due process of law in violation of his rights under the Constitution of the United States and of Article XIV, Section 1, in addition to and amendment thereof, the subsequent judgments of

the Common Pleas Court and Court of Appeals and assigned as error:

> "(e) Said Court of Appeals erred in holding that the aforementioned section of the General Code of Ohio, constituting part of the intangible tax law, applied to plaintiff's interests in said property, and that it was not in violation of the plaintiff's rights guaranteed by the Constitution of the United States of America and of Article XIV, Section 1 in addition to and amendment thereof, in each of the particulars hereinbefore set forth.
>
> • • • • • • •
>
> "(f) The judgment of the Court of Appeals is contrary to law and in violation of plaintiff in error's constitutional rights under the Constitutions of Ohio and also of the United States."

There thus can be no doubt that the plaintiff from the beginning alleged that Section 5323 and the other Ohio statutes involved requiring the assessment and collection of taxes on plaintiff's equitable interests on land evidenced by transferable certificates constitute an arbitrary and unreasonable discrimination without warrant of law because other equitable interests in land not so evidenced and all legal interests in land, whether so evidenced or not, were exempted from taxation, because such taxation constituted double and unequal taxation inasmuch as the lands in which plaintiff has an equitable interest have been assessed in the names of the legal owners or lessees thereof according to value without any deduction or diminution by reason of plaintiff's interest in said lands and taxes have been paid by the owners or lessees thereof, and this amounted to a lack of uniformity in taxation and an unconstitutional discrimination and that the levying and collection of taxes on this appellant's equitable interest in real estate situated

outside of Ohio amounted to a taking of property without due process of law, in violation of plaintiff's rights under Article XIV, Section 1, in addition to and amendment of the Constitution of the United States. With the judgments of the several courts above quoted providing in terms that the statute was and was not in violation of the Federal Constitution and with a petition in error to the Supreme Court taken as of right because of claims under the State and Federal Constitutions, and with the fifth paragraph of the syllabus of the decision of the Supreme Court of Ohio expressly reciting that Section 5323, General Code, violates no Federal constitutional right of the holder of such certificates, the case is clearly within the jurisdictional provision relied on.

The Supreme Court, in paragraph 2 of the syllabus, holds Section 5323, Ohio General Code, does not provide for a tax against the equitable interests in land but does provide a tax against the income derived from such equitable interests. But that section taxes all other property therein referred to and not the income derived therefrom, such income being only a measure of the value of the property. Such taxation of the income derived from equitable interests in land only, makes Section 5323 a discriminatory tax law offending against the equal protection clause of the XIV Amendment of the United States Constitution.

Royster Guano Company v. *Commonwealth of Virginia*, 253 U. S. 412.

Moreover, the court failed to take into account opinions of the highest court of other States and the opinions of Attorneys General of Ohio, the Securities Department of Ohio, and the Probate Courts of Ohio, amounting to a long settled construction that such land trust certificates are nothing but equitable interests in real estate and are to be treated as real estate.

Other cases believed to sustain the jurisdiction include:

First National Bank v. *Maine*, 284 U. S. 312 (1932), in which the court said at page 326:

> "It long has been settled law that real property cannot be taxed * * * except by the State in which it is located."

Louisville and Jeffersonville Ferry Co. v. *Kentucky*, 188 U. S. 385, in which it was held that the exemption from taxation extends not only to physical property beyond the jurisdiction, but to incorporeal rights therein.

Sellinger v. *Commonwealth of Kentucky*, 213 U. S. 200 (1909), in which it was held that Kentucky could not tax warehouse receipts for whiskey when the whiskey itself was exempt because beyond the jurisdiction of the taxing State.

Union Refrigerator Transit Co. v. *Kentucky*, 199 U. S. 194;

Western Union Telegraph Co. v. *Kansas*, 216 U. S. 1, 38;

Frick v. *Pennsylvania*, 268 U. S. 473.

Every court, except the Court of Appeals and Ohio Supreme Court in the present case, that has had the question before it, has held a land trust certificate to be an interest in realty and not subject to taxation as personal property.

Narragansett Mutual Fire Ins. Co. v. *Burnham*, 51 R. I. 371;

Bates v. *Decree of Court*, 131 Me. 176.

The Rhode Island case cites Opinion No. 3640 of the Attorney General of the State of Ohio, rendered in 1926 (pp. 375-7), that:

> "Holders of land trust certificates issued under a declaration of trust executed by the Cleveland Trust

Company of Cleveland, Ohio, as trustee, dated June 1, 1922, are not required to list said certificates for taxation."

The Attorney General of Ohio was later called upon to determine the relation of dealers in land trust certificates to the Ohio Blue Sky Law, and in 1926 Opinions (p. 528) the following syllabus appears:

"The sale of land trust certificates representing part of the equitable ownership in the premises to be occupied by the Bankers Building, at Chicago, is a sale of foreign real estate * * *."

As early as 1839, in *Lessee of Avery* v. *Dufrees*, 9 Oh. 145, it was decided that equitable interests in land should be treated the same as legal interests, so far as the laws of descent are concerned, and this holding, supplemented by others in later years, amounted to a rule of property that equitable interests in land are real estate in Ohio.

Respectfully submitted,

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